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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC., A CORPORATION,
PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (R. 51–66) is reported at 128 F. Supp. 764. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1–20) is reported at 243 F. 2d 504.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1957 (R. 701). A petition for rehearing, timely filed, was denied on May 13, 1957 (R. 702). The petition for a writ of certiorari was filed on August 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the action of Commodity Credit Corporation in modifying the price support program for raisins as announced by it in a press release was a breach of an implied promise not to hinder petitioner's performance of contracts to deliver raisins to it.

2. If there was a breach of contract, whether petitioner failed to mitigate damages.

3. Whether petitioner waived any claim to damages for breach of contract by delivering raisins after the contracts had been reinstated upon the express understanding that delivery would be at the contract prices and by accepting payment at the contract prices without reservation of the claim now asserted.

STATEMENT

In August 1947, the Department of Agriculture adopted a docket styled *Dried Fruit Price Support Program,* OC–95A, which was amended from time to time (Plaintiff's Exhibit 5). This docket, as first adopted, provided for a total purchase of 133,000 tons of dried fruit including 36,000 tons of raisins plus a contingent purchase of an additional 25,000 tons of raisins. The maximum amount of 133,000 tons was inserted in the docket for the purpose of placing a limit upon the contractual authority of the Government's contracting officials (R. 458–459). On September 5, 1947, the Secretary of Agriculture, with reference to this progam, issued a press release in Albuquerque, New Mexico, which stated that the Commodity Credit Corporation (hereinafter referred to as CCC) would purchase up to 133,000 tons of dried

fruit including 61,000 tons of raisins, and that the purchases would be made from processors and packers (Pet. App. 4).[1] On September 10, 1947, the Department of Agriculture, by Announcement No. 1, invited offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits (R. 27–29). Rosenberg Bros. & Co., the predecessor in interest of the present petitioner (referred to as Rosenberg), submitted an offer on September 19, 1947, to sell

[1] The press release stated:

> Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.
>
> The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.
>
> Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.
>
> Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.
>
> The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.
>
> Department officials stated that the program should enable the dried fruit industry to complete its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of dried fruit surplus problems.

10,000 tons of raisins to CCC at prices ranging between $151.00 to $152.00 per ton, depending upon the containers used. This offer was accepted on or about September 23, 1947, and on the following day a standard Government contract was executed between Rosenberg and CCC, by the terms of which Rosenberg agreed to deliver to CCC upon demand and at the stated prices 10,000 tons of raisins in the period October 1–December 15, 1947 (Pet. App. 2).

On October 1, 1947, the Department of Agriculture issued Announcement No. 2 which invited bids for dried fruit including 31,000 tons of raisins (R. 36–37). On October 8, 1947, Rosenberg in response to this Announcement offered to sell 10,000 tons of raisins (Pet. App. 2). On October 9, 1947, the docket was amended (Amendment No. 1), and provision made for increasing the maximum quantity of raisins to be purchased to 121,000 tons (R. 75). The record is not clear as to when the Secretary of Agriculture approved the amendment but it appears to have been several days later (R. 120–122).

On October 13, 1947, CCC accepted Rosenberg's offer of October 8 to the extent of 4,330 tons priced at $149.40 per ton, and on that date a formal contract was executed (Pet. App. 2). On October 14, the Department of Agriculture publicly announced Amendment No. 1 stating that offers would be made to purchase an additional 60,000 tons of raisins (R. 17–18). Rosenberg promptly requested cancellation of its contracts following this public announcement, but this request was denied (R. 222–224, 241–242, 253). On October 17, 1947, CCC further amended its raisin

purchasing program by authorizing purchase of raisins from growers or processors (R. 76). On November 26, 1947, the program was further modified by requiring all packers *thereafter* selling Thompson seedless raisins to CCC to certify that they had paid the grower not less than $135.00 per ton (R. 44).

Rosenberg at the time of executing its contracts had not purchased and did not have available raisins to fill the Government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable it to fulfill the Government contracts without loss (Pet. App. 3). However, the growers were in continuous resistance to the lower prices offered by the packers and only 800 tons were purchased by Rosenberg in the period September 1–November 3, 1947 (Pet. App. 3). After that date raisins were sold in substantial quantities at prices ranging from $127.00 to $142.00 (Pet. App. 3). Since Rosenberg's normal processing and packing cost was $40.00 per ton, it was impossible for Rosenberg to purchase raisins at these prices without suffering a substantial loss on its Government contracts. Although CCC continuously demanded raisins under the contracts, Rosenberg consistently refused to deliver, stating that it had no raisins available (Pet. App. 3; R. 301–302, 317–319). In January 1948, the price dropped sharply and raisins were being sold in that month at prices ranging from $100.00 to $125.00 (Pet. App. 3). By that time CCC was out of the market (R. 388–389), Rosenberg's commercial sales were almost complete, and Rosenberg had more than enough raisins on hand to fill its remaining commercial com-

mitments (R. 338). Rosenberg therefore decided to make delivery to the Government (R. 338).

On January 22, 1948, Rosenberg requested shipping instructions and an amendment to the contract reinstating the tonnage and extending the delivery dates (R. 263–264). The contracting officer agreed to furnish an amendment reinstating the tonnage and extending the delivery dates, and agreed further that no damages for non-delivery would be claimed by CCC provided Rosenberg agreed to waive all carrying charges (R. 268–269). The contracting officer stated that CCC was willing to take delivery at the contract prices, and further stated that the prices would not be raised except with respect to a minor adjustment which related to the type of containers involved. *Id.* Rosenberg inquired as to whether it could make delivery without prejudice to a claim for additional compensation and was advised that any counter-offer or qualification would require a review by the officials in Washington, and that pending such review, shipping instructions would necessarily have to be issued to other packers (R. 269–270, 609–610). The contracting officer also stated that, if Rosenberg would agree to make immediate delivery, shipping instructions would be issued at once, but that CCC could not agree to anything that could be interpreted as recognizing a claim by Rosenberg (R. 610). On January 28, Rosenberg agreed to make delivery, and delivery was made in the period February-March, 1948 (Pet. App. 12).

Vouchers were submitted by Rosenberg at the contract prices without any reservations of its asserted claim for damages and Rosenberg was paid on that basis (Pet. App. 12; R. 635–636). Rosenberg thereafter filed a claim which was denied and this suit was instituted (R. 3).

The District Court ruled in Rosenberg's favor, holding that the revised program was in violation of an implied agreement not to increase Rosenberg's cost of performance (R. 58). The court further ruled that the acts in question were proprietary and not sovereign, and that there was no evidence establishing the existence of a waiver by Rosenberg of the alleged breach (R. 60). The District Court also found that Rosenberg would have purchased raisins at $110 per ton had the Government adhered to the purchase program first announced, and awarded damages in the total amount of $160,366.88 (R. 65).

The Court of Appeals reversed and dismissed the complaint (Pet. App. 18), holding that recovery was barred on three grounds. First, the CCC had not breached its contract by modifying the raisin price support program. Second, even if CCC had breached its contract with Rosenberg, Rosenberg's loss resulted not from such breach but from Rosenberg's action in performing the contract in disregard of its obligation to use reasonable care to minimize damages. Finally, the court held that Rosenberg waived any claim to damages by delivering raisins after the contracts had

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been reinstated by CCC at Rosenberg's request upon the express understanding that delivery would be at the contract prices and accepting payment, at the contract prices, without reservation of the claim now asserted.

ARGUMENT

The decision of the court below rests upon the application of settled principles of contract law to the particular facts of this case, and recovery was correctly denied on three separate and wholly independent grounds. There is no conflict of decisions. Further review by this Court, accordingly, is not warranted.

1. Petitioner contends that by modifying the raisin purchasing program, as announced in the press release of September 5, CCC violated an implied promise not to make performance more difficult. While it is true as a general rule that, by entering into a contract, the contracting parties impliedly promised not to hinder or prevent performance by the other, this rule does not limit the normal activities of the parties unless the evidence reasonably leads to a conclusion that the defendant had agreed so to limit his activities. *United States* v. *Fidelity & Deposit Co. of Maryland*, 152 Fed. 596 (C. A. 2); *Megan* v. *Updike Grain Corp.*, 94 F. 2d 551 (C. A. 8), certiorari dismissed per stipulation, 305 U. S. 663; *Standard Accident Ins. Co.* v. *United States*, 59 F. Supp. 407 (C. Cls.), certiorari denied, 325 U. S. 870; 1 Restatement, *Contracts*, § 315; 4 Corbin, *Contracts*, § 947; 5 Williston, *Contracts* (Rev. ed.), § 1293–A.

The lack of an implied promise here becomes clear when the press release on which Rosenberg relies is read in light of the purposes of CCC and of the raisin program announced in the release. As the court below noted, CCC "was created by Congress for the purposes, among others, of stabilizing and protecting farm income and prices; of assisting in the maintenance of balanced and adequate supplies of agricultural commodities; and of facilitating the orderly distribution of agricultural commodities. Title 15 U. S. C. A., Section 714. It was granted the specific powers, by Congress, to support the prices of agricultural commodities through loans, purchases, payments, and other operations; to increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets, or by developing new and additional markets and uses for such commodities * * * Title 15 U. S. C. A., Section 714c." (Pet. App. 7–8.)

It was in discharge of these functions and duties, imposed upon it by the statute, that in the summer of 1947, the Department of Agriculture, as an incident of its continuing study of agriculture and under the added stimulus of inquiries and requests from growers and others, began to consider what action, if any, it should take to assist the raisin industry to dispose of the anticipated surplus. It was expected by the Department that the packers would approach the 1947 marketing season on a cautious basis since the price for packaged raisins had declined from 22 cents per pound (November 1946) to 11 cents per pound (July 1947) (R. 476). At that time, the Department con-

cluded, tentatively, that a substantial surplus of 1947 crop raisins was to be expected on the basis of current production and marketing expectations. Such an estimate at that time in the crop year involved considerable uncertainty, however, in that it required an estimate of what the total grape crop and the various effective demands would be. The tentative estimate was that the surplus might be as high as 100,000 tons or even more (R. 482) out of a total estimated crop of 325,000 tons (R. 157). Experience had shown that such an advance prediction might differ considerably from the actual production and surplus which later developed (R. 482–483). Nevertheless, recognizing that serious consequences would follow if the market were left without Government support, CCC undertook the program announced in the press release.

The explicit objective of the program as stated in the press release was to achieve prices which would be fair to both producer and consumer, *supra*, p. 3, fn. 1. While the press release stated that CCC intended to purchase up to 61,000 tons of raisins, this statement was made sometime before the harvesting had begun of the grapes to be later cured as raisins. Necessarily then, in formulating the plan announced, the CCC had to rely on estimates of the raisin crop and of the requirements of the domestic and foreign markets. There was no way of knowing whether the plan initially formulated would bring stabilized and fair prices. However, if the market did not respond as anticipated it would obviously be the duty of the CCC under the statute to revise its plan to meet the exigencies of the times.

All these considerations, which strongly negate any implied promise not to change the program, were well known to petitioner before it submitted its bid in response to the specific invitations for bids. Petitioner nevertheless insists that it could not have assumed the risk that changes in the program might be made because the press release was "clear and unequivocal" and because CCC officials rejected any change in the program "as announced" (Pet. 11). Contrary to these assertions, a reading of the press release, *supra*, p. 3, will demonstrate not only that it contains no statement that CCC would not, if necessary, modify its program but also that it indicated the tentative nature of the program in several ways. The release stated CCC would purchase *up to* 133,000 tons of dried fruit "*if* the purchase of this total quantity * * * [was] necessary to provide outlets for the relatively large 1947 production." (Emphasis added.) The release also said that an announcement would soon be made inviting packers to bid on a *portion* of the quantity. Moreover, prior to bidding, petitioner had made unsuccessful efforts to have the price support program modified and it knew that the growers were also making intensive efforts to secure a change. However, concluding that the growers would also fail and that the Government would not provide further price support, petitioner deliberately assumed the risk that the price of raisins would therefore decline sharply by selling 14,000 tons while in a short position. The fact that CCC, contrary to petitioner's expectation, did thereafter amend the original program does not

operate to convert petitioner's prediction into an implied promise by CCC.

2. Even assuming that CCC, by changing the raisin program, breached an implied promise to petitioner, the court below properly held that the settled principles requiring mitigation of damages barred recovery, for, as the court held, petitioner would not have incurred any loss if it had simply refused to deliver under the contracts. The contracts which were executed on September 24 and October 13, 1947, provided for delivery from October 1947 through January 1948. If there was any breach of contract by CCC, this must have occurred on October 14, October 17 and November 26, when the changes in the program were announced. Although CCC made its first call for delivery of raisins on October 16 and frequently thereafter, Rosenberg, having sold the raisins short, made no effort to fulfill its Government contracts during this time when the market prices for raisins were rising. Indeed, Rosenberg advised CCC that it did not have raisins available and consistently refused to furnish raisins in the period from October through December, *supra*, p. 5. During that entire period, Rosenberg purchased raisins for its commercial customers only and the District Court found that no purchases for the Government contracts were made prior to the latter part of December (R. 63–64). Rosenberg asserted that it did not anticipate making any profits on these contracts (R. 196, 209–210, 218); hence, it suffered no damages thereunder as long as they remained entirely executory and would have suffered no damage at all if it had rescinded the con-

tracts, as it believed it had a right to do (R. 294–295, 338). However, instead of rescinding without incurring damage, Rosenberg undertook to perform the contracts and solely by this action suffered the alleged loss which it seeks to recover in this proceeding. In such circumstances, the requirement of mitigation of damage formulated by this Court in *Warren* v. *Stoddart*, 105 U. S. 224 at 229, is fully applicable:

> The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.

See also, *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573 (C. A. 6); *Board of Trustees* v. *O. D. Wilson Co.*, 133 F. 2d 399 (C. A. D. C.); see, 1 Restatement, *Contracts*, § 336; 5 Williston, *Contracts* (Rev. ed.), § 1298.

Rosenberg contends that this principle of mitigation is inapplicable here because, as the party against whom the breach was committed, it had an election to rescind, to sue for damages for the breach at once, or to continue performance and then sue for damages. But this choice must be made consistent with the requirement that losses be minimized. Indeed, as Professor Williston points out (5 Williston, *Contracts* (Rev. ed.), §§ 1298, 1337), this choice is but a particular application of the general rule of damages that an injured party may not needlessly increase the

liability of the wrongdoer, a rule which, far from being belied, is supported by the cases cited by petitioner (Pet. 13–14). In *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F. 2d 488 (C. A. 10), no added expenses had to be incurred by the injured party in order to remain in a position to perform after repudiation by the other side. Similarly, in *Winans* v. *Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952, continued performance after breach by the injured party was held not a bar solely because it had not operated to increase the loss.

3. Finally, the Court of Appeals correctly ruled that Rosenberg had waived its claim, if any, for damages by delivering the raisins after the contracts had been reinstated by CCC upon the express understanding that delivery would be at the contract price and by accepting payment at the contract prices without any reservations of the claims it now seeks to assert. It is settled law that if a party, following a dispute as to the price due, performs the contract, and accepts the stipulated price, he cannot thereafter recover damages. *Early & Daniel Co.* v. *United States*, 271 U. S. 140; *Willard, Sutherland & Co.* v. *United States*, 262 U. S. 489; *Nelson Co.* v. *United States*, 261 U. S. 17; *Francis* v. *United States*, 96 U. S. 354; *Savage, Executrix* v. *United States*, 92 U. S. 382.

These principles apply here.[2] As stated, *supra*,

[2] While petitioner alleges a conflict in this regard, the cases cited are inapposite. In *Blair* v. *United States*, 147 F. 2d 840 (C. A. 8), the court held only that by accepting partial payments after a breach, a party does not waive his right to sue for damages thereafter. In *United States* v. *Lundstrom*, 139 F. 2d 792 (C. A. 9), it was contended that acceptance of

pp. 6–7, CCC's offer to accept the raisins at a later date was contingent upon delivery "at the contract prices" and the offer further stipulated that the "prices would not be raised" except in a minor particular relating to the type of container to be used. Moreover, the contracting officer rejected Rosenberg's proposal that the reinstatement of the contracts contain a reservation to Rosenberg of the right to assert a claim. Thereafter, following the reinstatement, Rosenberg delivered the raisins and billed the Government at the contract prices upon standard form vouchers in which he certified that the bills presented were correct and just. No reservations of any kind were contained on these voucher forms. It is clear therefore that Rosenberg accepted the offer to reinstate the contracts knowing that the contracting officer intended that the Government pay no more than the contract price. As the Court of Appeals held, this unquestionably constituted a waiver.[3]

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progress payments and the signing of vouchers stating that the payments were just and correct presented an accord and satisfaction which barred recovery. This question was not decided, however, because it had not been presented properly.

[3] Rosenberg advances as a ground for granting certiorari that the court below improperly failed to follow the findings of fact of the trial court (Pet. 14–16). But the Court of Appeals' disagreement with the trial court was in large measure on issues of law, *i. e.*, the legal conclusions to be drawn from the facts. Moreover, to the extent that the disagreement was on facts, Rule 52 (a) of the Federal Rules of Civil Procedure makes the trial judge's findings conclusive only if not clearly erroneous, and it is apparent from the opinion of the court below that it did not regard the District Court's findings as meeting that standard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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